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Supreme Court, U.S.
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NO. 93-2021

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ALABAMA,

PETITIONER - APPELLEE,

V.

CHARLES HANSBROUGH,

RESPONDENT - APPELLANT.

SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

[28 U.S.C. §2254 PROCEEDINGS]

REPLY BRIEF TO THE
BRIEF IN OPPOSITION

JAMES H. EVANS
ALABAMA ATTORNEY GENERAL

*JAMES B. PRUDE
ASSISTANT ALABAMA ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 252-7300

*ATTORNEY OF RECORD

9 pp

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS.....	i
TABLE OF CASES.....	ii
SUPPLEMENTAL ARGUMENT IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI....	1
CONCLUSION.....	6

TABLE OF CASES

	PAGE(S)
Ford v. Georgia, 498 U.S. 411 (1991).....	4
Lee v. State, 342 So.2d 1390 (Ala. Cr. App. 1977).....	1

SUPPLEMENTAL ARGUMENT IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

In the Brief in Support of the Petition for Writ of Certiorari, and in its Reply Brief, Petitioner stated its agreement with the Circuit Court of Appeals For the Eleventh Circuit and with Respondent that Alabama did not have any appellate rule or case authority holding that a voluntary dismissal of a notice of appeal constituted a bar to a subsequent appeal. However, since the filing of the Reply Brief, Petitioner has found Alabama case authority which in fact held that a voluntarily withdrawn notice of appeal would preclude the defendant from reinstatement of the appeal. In Lee v. State, 342 So.2d 1390 (Ala. Cr. App. 1977), the Court stated:

"It further appears that within the time provided by law that he appealed from the judgment of conviction and certificate of appeal was filed with this court.

Subsequently thereto, and before the present transcript was mailed or sent to this court, he moved the trial court to withdraw his appeal. The motion was granted, inter alia, by judgment on May 3, 1976, T. 15, Section 381, Recompiled Code 1958, authorizes this procedure.

Thereafter, on June 24, 1976, this court, as an incident to the trial court's dismissal of the appeal, dismissed the appeal, thereby terminating this court's jurisdiction.

Thereafter, on August 10, 1976, appellant, through his attorneys, filed in the circuit court his motion in writing to vacate and set aside its order granting petitioner's motion for withdrawal of appeal dated May 3, 1976, and to reinstate petitioner's notice of appeal.

The trial court, on August 13, 1976, ordered and adjudged that the motion to vacate the order of dismissal be granted and that the appeal be reinstated.

We do not know of any statutory or other authority for the trial court to reinstate the appeal as it undertook to do in this case. Dismissal of the appeal at nisi prius level is authorized by statute, supra, but a subsequent reinstatement is not authorized.

This court dismissed the appeal at the time and in the manner provided by law and so far as this court is concerned the appeal is not now pending.

The motion of the State to strike the record here filed as an incident to the dismissal appeal has merit. The record is stricken."

. . .

CONCURRENCE

BOOKOUT, Judge, concurring specially:

I concur in the result of this opinion, however, I do not concur with any implication that an appeal cannot be reinstated after dismissal if the reinstatement is within the time for filing an original appeal. That is, within six months pursuant to Title 15, 368, Code of Alabama 1940 in the instant

> case, or within forty-two days after judgment pursuant to Rules 3 and 4, Alabama Rules of Appellate Procedure (effective December 1, 1975).
>
> Since the attempted reinstatement in this case took place more than six months after rendition of judgment, the trial court had no jurisdiction over the appeal and neither do we.

The existence of this case authority is important to the granting of the writ because it dispels Respondent's claim that the refusal to allow him to give a subsequent notice of appeal was "completely without precedent" [Brief in Opposition, page 7], and dispels the Eleventh Circuit's holding that the refusal to accept the subsequent notice of appeal was not a "firmly established and regularly followed" state procedural rule as required by Ford v. Georgia, 498 U.S. 411 (1991).

The question presented by this Petition For Writ of Certiorari, then is not whether the State of Alabama consistently follows an established rule which disallows a subsequent appeal after a prior notice of appeal has been withdrawn because, as Lee makes clear, the State certainly does. The important question to be decided is whether the Respondent had a federal constitutional right to either reinstate his appeal or to give a second notice of appeal after he had voluntarily withdrawn his prior valid notice of appeal.

CONCLUSION

In light of the importance of this case to the State's ability to enforce its procedural rules regarding the appellate process, Petitioner requests that the Court grant the writ and resolve the question presented herein.

Respectfully submitted,

JAMES H. EVANS
ATTORNEY GENERAL
BY-

James B. Prude

JAMES B. PRUDE
ASSISTANT ATTORNEY GENERAL

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